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Issue Date: 29 September 2005

In the Matter of

ROBERT P. POMELOW
Claimant

Case No.: 2001 LHC 00838/39
OWCP No.: 1-150576/77

v.

ATKINSON CONSTRUCTION
Employer

and

TRAVELERS PROPERTY CASUALTY CORP.
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-In-Interest

Robert P. Pomelow, *Pro Se*

Richard F. van Antwerp, Esq.
Portland, ME
For the Employer

Before: JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER ON REMAND

This case arises from a claim under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (hereinafter referred to as "the Longshore Act" or "the Act"). This case is on remand issued October 6, 2003 from the Benefits Review Board (the "Board" or the "BRB"). A hearing in this matter was noticed on July 1, 2004 and held on August 2, 2004, in Portland, Maine. The claimant failed to appear on August 2, 2004, believing the hearing date to be set for the fourth of August. At the August 2, 2004 hearing, the Employer

was represented by counsel and introduced six supplemental exhibits (TR2 7).[1] Another hearing was scheduled for November 15, 2004. The claimant appeared at this hearing *pro se* and introduced four supplemental exhibits. Supplemental Exhibits 3 and 4 were admitted into evidence, as well as pages 3 and 4 of Supplemental Exhibit 2 (TR3 10-11). The employer introduced two additional supplemental exhibits, which were admitted into evidence as ESX 7 and 8 (TR3 14).

By letter from employer's counsel dated December 3, 2004, the parties notified me that they had reached a settlement. But a settlement agreement was not filed, and on May 31, 2005, employer's counsel notified me that the settlement fell through. A deadline of June 30, 2005 was set for post-hearing briefs, which both parties submitted. The employer's brief arrived by fax on July 19, 2005.[2]

Procedural History

This claim first came before me in August of 2001. A hearing was held on August 8, 2001, at which time the claimant was represented by counsel. I issued a *Decision and Order* denying benefits on June 17, 2002. First, I found that the only claim at issue was a claim for injuries to claimant's knees. In addition, I found that the claimant was not a credible witness and did not sustain a work-related injury on July 5, 2000, either as a result of a fall on that date or from a cumulative trauma from his employment with the employer from January to July, 2000.

The claimant filed a *pro se* appeal on July 16, 2002. On October 6, 2003, the Benefits Review Board issued its *Decision and Order* vacating my June 17, 2002 decision. The Board held "that claimant's knee injuries are work-related as a matter of law." The Board remanded the case for a determination on the nature and extent of the injury to claimant's knees and for a

[1] Citations to the record of this proceeding will be abbreviated as follows: CX — Claimant's Exhibits; CSX — Claimant's Supplemental Exhibits; EX—Employer's Exhibits; ESX — Employer's Supplemental Exhibits; TR1 — Hearing Transcript from August 8, 2001; TR2 — Hearing Transcript from August 2, 2004; and TR3 — Hearing Transcript from November 15, 2004.

[2] Claimant objects to the Court's acceptance of the employer's post-hearing brief on the grounds that it was 19 days late. In an *ex parte* communication dated July 25, 2005, he argues that he would be prejudiced if the Court accepts the employer's brief and such acceptance would demonstrate a bias in favor of the employer and insurer. The employer's failure to meet the deadline for filing its post-hearing brief, which is simply a summary of the employer's position, does not prejudice the claimant. Employer's brief does not refer to any evidence that is not already in the record or raise any new issues. In contrast, claimant's letter raises the issue of employer's safety record for the first time. The employer's record with the Occupational Safety and Health Administration ("OSHA") has not been raised before and cannot be raised now, even if it were relevant to the case at hand.

complete determination regarding injuries to his back and hips.[3] Two subsequent hearings were held in this case. At the August 2, 2004 hearing, Randy Washburn, a private investigator, testified for the employer. At the November 15, 2004 hearing, only the claimant testified.

Claimant seeks compensation for temporary total disability from July 10, 2000 to October 10, 2002 due to an injury to his knees, back, and hips occurring on July 5, 2000. Employer contends that claimant did not suffer an injury when he tripped on July 5, 2000; that any disability claimant had regarding his knees, back, and hips preexisted his employment with Atkinson Construction and is unrelated to that employment, or that claimant is capable of returning to work in less strenuous positions. Employer also raises the issue of collateral estoppel, citing a Maine state workers' compensation decision where the hearing officer determined that Mr. Pomelow is not a credible witness and that he no longer suffers any disability attributable to his knee complaints. The parties stipulated that claimant's average weekly wage at the time of the alleged injury was $956.92 (TR1 5).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

The claimant is 49 years old, and has an associate's degree in business management with a major in computer programming and system analysis which he received in 1988. He appeared at both hearings using a crutch on the right side. He spent over ten years in the Army, the first four as a reservist and the rest on active duty as a construction engineer and transportation specialist.

After obtaining his associates degree, he worked briefly as a car salesman, in advertising sales and shoe manufacturing. Starting in 1989 or 1990, claimant worked in the construction industry, working steadily each year from mid-March through November (TR1 47, 50). He spent three years as an electrician's helper, but testified that he "didn't possess the aptitude, the mental aptitude to be an electrician in an industrial situation" (TR1 48). In 1993, he returned to the work he learned right after high school – welding. He worked as a structural welder and in structural building, maintenance and repair (TR1 48-49). In December 1999 or January 2000, claimant went to work for the employer, which was building a dock at the Bath Iron Works shipyard (TR1 18-19). Most of his work for Atkinson consisted of building forms for concrete and doing other carpentry or laborer jobs. He rarely welded (TR1 19).

[3] Regardless of the Board's holdings, it is clear that the claim in this case did not encompass injuries to claimant's back and hips. Injuries to claimant's knees were the only injuries listed on the claim forms and the LS-18, and they were the only injuries raised by claimant's counsel in his opening statement. It is clearly untimely to raise an issue for the first time in a post-hearing brief, as claimant attempted to do in regard to his alleged back injury. But even in his post-hearing brief the claimant did not allege an injury to his hips. In this regard, see page 5 of claimant's post-hearing brief, where he states that "claimant is alleging injury to both knees and his low back"

On July 19, 1982, while in military service, claimant had surgery on his left knee – an open arthrotomy in which the medial meniscus was removed – due to a service-connected injury (TR1 15; CX 4, at 146-49). He had further surgery – arthroscopic this time – on the same knee, which was preformed by Dr. Watanabe at the VA hospital in Togus, Maine in September 1987. Dr. Watanabe testified that a debridement – essentially cleaning up the knee joint – was performed at that time (CX 15, at 45). Sometime prior to April 5, 1993, claimant was given a 10% disability rating for his left knee by the VA (TR1 16; CX 4, at 209). He also had complaints of back pain as early as 1977 (CX 4, at 25, 156), and infrequent complaints of right knee pain as early as 1982 (*id.* at 146). However, claimant's right knee was not a significant concern prior to his employment with Atkinson (TR1 32). Claimant testified that prior to working for Atkinson he was able to work in industrial construction despite his problems with his left knee because employers would accommodate his disabilities (TR1 17). But incongruously, he testified that prior to going to work for Atkinson he was physically active, going hiking, rock climbing and mountain biking (TR1 34).

Claimant testified that at the time he began working for Atkinson, his knee problems were "okay" (TR1 18). His left knee and hips were somewhat stiff when he woke up, but he could function and was able to do his construction work (TR1 18, 31). His pain was tolerable with an aspirin (TR1 31). He testified that over the months he worked for Atkinson he experienced an increased build-up of pain in his knees, as well as his hips and lower back, which began bothering him just before the July fourth weekend (TR1 22-23). Most of his work was on concrete rebar mats. He stated that to get around on these mats he crawled on his hands and knees (TR1 21). Because of this increased pain, he stated he took two days of leave before the Fourth of July, and came back to work on July 5th (TR1 24).

Claimant testified that at about 4:30 in the afternoon of July 5, 2000, he bumped his right leg on an exposed rebar end in a mat, which caused him to fall. He stated that he rolled around, ending up on his back (TR1 22). He stated that he immediately reported the injury to his foreman, and he went home (TR1 25-26). The next day, he stated, his knees, hips, and low back were bothering him, and he was not capable of performing his work, but he reported to work anyway. He testified that he was taken to the urgent care clinic that day (TR1 26-27), but the medical records in evidence show that he was first seen by Dr. Dumdey in the Urgent Care Center five days after claimant allegedly fell, on July 10, 2000 (CX 1, at 3). Dr. Dumdey noted that the claimant had been having left knee pain for 1 ½ months or more which was exacerbated by the injury on July 5. He questioned whether the claimant was malingering, and referred claimant to the Occupational Health Associates ("OHA"). At OHA, he was seen by a nurse practitioner, Linda Muller, on July 13 (CX 2; TR1 58). Ms. Muller stated that the claimant was being seen for knee pain which was much worse than usual over the past 2 ½ months. She did not mention a fall on July 5 (CX 2, at 7-9). She diagnosed degenerative joint disease of the knees, put claimant on pain medication, and restricted him to light duty. Another appointment was scheduled for a week later.

Ms. Muller saw the claimant again on July 20, 2000. At that visit, she reported that claimant was doing worse, that he was experiencing more pain and stiffness in his knees and now his hips (*id.* at 11). She indicated that she believed these problems were work-related (although she still made no reference to a fall on July 5), took claimant off duty, and referred him

to an orthopedist, Dr. Ramirez (*id.* at 12). She also reported that claimant had had a bad reaction to the previous medication she had prescribed, Indocin, and noted that he requested another pain medication. So she prescribed Darvocet, and sent claimant for physical therapy (*id.*).

On that same day, claimant was seen in the VA Hospital in Togus, Maine by a nurse and a physician's assistant (CX 4, at 95-97, 179-80). It is not known whether he went to OHA before he went to the VA Hospital or vice versa. At the VA hospital, x-rays of claimant's knees and spine were taken. It was noted that the claimant had not been seen at the hospital since 1987, and that he came to the hospital because he wanted pain medication (*id.* at 95). At that time, both Relafen and Zantac were prescribed (*id.* at 96). Claimant apparently saw Dr. Antonucci, whose signature block states she is an amulatory care physician, at the VA Hospital on August 18, 2000. Dr. Antonucci noted a recent exacerbation of knee pain, and also indicated that claimant's x-ray was unremarkable (*id.* at 141). She indicated that the claimant was to see Dr. Ramirez on September 7.

On August 8, 2000, claimant was examined by Dr. Boucher, a board-certified specialist in occupational medicine (CX3), on behalf of the carrier. Dr. Boucher does not indicate that claimant suffered a discrete injury on July 5, 2000. Rather, he states that claimant had gradually increasing pain which was reported on July 5, 2000 (*id.* at 18). During his examination, the claimant complained of pain with all movements. Dr. Boucher diagnosed osteoarthritis in claimant's left knee and questionable mild diffuse osteoarthritis including lumbroscacral spine and hips. However, he found marked symptom magnification and questionable factitious illness, and sarcastically indicated he expected claimant to fully recover once his compensation claim is resolved (CX 3, at 22). Dr. Boucher also found that claimant had reached maximum medical improvement, stating that "[i]f the examinee suffered any aggravation of underlying osteoarthritis as he reported on July 5, 2000, this clearly has long since resolved" (*id.* at 23). He added that "[t]here is no objective bases to support any restrictions at this time" (*id.*).

Claimant returned to OHA on August 29, 2000 (CX 2, at 14-16). Ms. Muller first noted that Dr. Ramirez told her he had not seen the claimant and was not going to see him. She then noted that the claimant was doing much better. He was walking normally and, after a few stretches he could ambulate normally. She also stated that the range of motion in his knee had "improved greatly" (*id.* at 14). She concluded that the claimant is improving, and released him to return to work restricted to lifting and carrying no more than 20 pounds and not climbing on ladders. She then indicated that claimant had decided to be treated by an orthopedist he would not identify, and that their treatment of him had therefore concluded. It should be noted that throughout claimant's treatment at OHA, although Dr. Mesrobian and Ms. Muller co-signed all of the reports, claimant never saw a physician (TR1 58).

Despite being released to return to work, claimant did not do so. Instead, he sought treatment at the VA Hospital in Togus. On September 8, 2000, Dr. Baker examined him for his left knee pain. There is no mention of a July 5, 2000 injury in Dr. Baker's report, nor does Dr. Baker note any problems with claimant's right knee. Dr. Baker diagnosed mild post-traumatic osteoarthritis (CX 4, at 144-45). The on September 14, 2000, claimant saw Dr. Butler for an orthopedic consultation. Again, there is no reference to a work-related injury on July 5, 2000 (*id.* at 141-43), although Dr. Butler stated claimant's "right knee bothers him some …" (*id.* at 142).

Dr. Butler stated that claimant's knees were stable and showed full range of motion. He also found that the x-rays of claimant's knees were unremarkable and that claimant also had a low back condition which may contribute to the weakness of his knees. He stated that the claimant could perform modified work, with limited climbing of stairs and ladders, limited standing on hard surfaces, and no heavy lifting. He added that these restrictions are "indefinite" (*id.* at 143). Further, he referred claimant for physical therapy. Finally, he also indicated that claimant was being followed by a private orthopedic surgeon. However, there is no evidence to substantiate claimant's assertion that he was seeing another doctor.

On October 17, 2000, claimant underwent a neurology consultation at the VA Hospital with Dr. Posey, to have his back examined (CX 4, at 221-23). Dr. Posey first stated that claimant had been out of work for four months due to severe back pain. There was no mention of problems with claimant's knees. Dr. Posey found lower lumbar pain without radiculopathy, and noted evidence of "functional addition" (*id.* at 222). He planned to return claimant to work in one month. Although claimant was supposed to return to see Dr. Posey for a follow-up visit, he failed to show up for his appointment (*id.* at 224). Then on December 28, 2000, claimant underwent a physical examination at the VA Hospital by Dr. Antonucci (*id.* at 224-26). Dr. Antonucci described claimant as very negative, and noted that he refused to even consider making lifestyle changes such as quitting his two packs per day cigarette smoking or switching to low-fat milk. Dr. Antonucci stated that claimant has difficulty walking. But, although she was aware of claimant's problems with his knees, she found that his difficulty in walking was due to intermittent claudication[4] resulting from arteriosclerotic disease. Dr. Antonucci rescheduled the claimant's follow-up appointment with Dr. Posey, who saw him on January 30, 2001. Dr. Posey stated that claimant did not attempt to return to work, reached the same diagnoses as he did previously, and indicated he was going to send the claimant for a psychiatric consultation because of his sleeplessness (*id.* at 230).

Claimant saw Dr. Watanabe, the former chief of orthopedics at the VA Hospital in Togus (CX 15, at 3-4), for the first time in many years on March 14, 2001 (*id.* at 21, Deposition Exhibit 3). In discussing claimant's medical history, Dr. Watanabe noted that claimant stated his knee, hip and back pain had gotten progressively worse during his employment for Atkinson so that he could no longer work. But he does not mention a discrete incident on July 5, 2000 (*id.* at 22, Deposition Exhibit 3). Dr. Watanabe reviewed x-rays of claimant's knees and spine taken in July, 2000 and stated that the x-rays of claimant's knees demonstrated mild degenerative change; the x-ray of claimant's lumbrosacral spine also showed only mild degenerative change; and a CT scan of claimant's lumbrosacral spine showed bulging at L3-4 with mild stenosis of L4-5 and L5-S1 (*id.*, Deposition Exhibit 3 at 2). In regard to his physical examination, it was essentially negative. There was no atrophy or effusion; he had a full range of motion in his hips; Lachman's sign and McMurray's sign were negative; and his patella was stable although there was some crepitus (*id.* at 53-57). He also found no weakness of extensors of the toes or feet, and the only

[4] Intermittent claudication is "a complex of symptoms characterized by absence of pain or discomfort in a limb when at rest, the commencement of pain, tension, and weakness, after walking is begun, intensification of the condition until walking becomes impossible, and the disappearance of the symptoms after a period of rest. The condition is seen in occlusive arterial diseases of the limb …." *Dorland's Illustrated Medical Dictionary* at 223 (28th ed. 1994).

sensory loss he found was attributable to the injury which led to the arthrotomy almost 20 years earlier (*id.*, Deposition Exhibit 3 at 2). He concluded by stating that claimant's "clinical manifestation is a bit exaggerated in my view" (*id.* at 3).

Subsequent to claimant's March 14, 2001 examination with Dr. Watanabe, claimant went for physical therapy for about two months (CX 7). Dr. Watanabe saw claimant twice more, on May 17, 2001 (CX 15, Deposition Exhibit 4) and August 16, 2001 (*id.*, Deposition Exhibit 2). In regard to the May 17 visit, Dr. Watanabe wrote short notes indicating claimant was undergoing physical therapy and that he was improving. In his August 16 report, Dr. Watanabe notes claimant's continued improvement. He states that the claimant no longer needs his right knee brace, and only needs the left knee brace when he has to walk long distances. He discharged the claimant from his care, but recommended that he undergo vocational rehabilitation because he did not believe claimant could work as a welder anymore (*id.* at 16).

At his deposition, Dr. Watanabe testified that there is no objective evidence that claimant's knees were made worse during his employment with Atkinson (*id.* at 60). His opinion that claimant's employment at Atkinson aggravated his pre-existing knee condition is based solely on claimant's subjective complaints that his pain increased while he was working for Atkinson (*id*. at 61). Although claimant had developed some very mild degenerative changes in his knee between 1987 and July, 2000, as demonstrated by a small amount of osteophyte formation on his July, 2000 x-ray, it would have taken years for these osteophytes to develop (*id.* at 25, 59). Moreover, these osteophytes would not have produced the symptoms claimant was reporting (*id.* at 62).

The employer also provided evidence by a vocational rehabilitation specialist, Kathleen Tolman, who testified that the claimant is not totally disabled and is capable of working in many different jobs. Ms. Tolman reviewed claimant's medical records, education, and employment history. The employer provided Ms. Tolman with the emergency room records from July 10, 2000, progress notes from OHA, an x-ray report from July 24, 2000, Dr. Boucher's August, 2000 medical report, medical records from the VA Hospital in Togus, and a physical therapy record from October 26, 2000. Based on the claimant's work restriction as reported by Ms. Muller on August 29, 2000, Ms. Tolman concluded the claimant had a light work capacity according to the U.S. Department of Labor, which is defined as "exerting up to 20 pounds of force occasionally, and /or up to 10 pounds of force frequently, and/or a negligible of amount of force constantly … to move objects. Physical demand requirements are in excess of those for sedentary work …." (EX 1).

Ms. Tolman noted that claimant received an associates degree in business administration from Kennebec Valley Technical College in 1988. After discussing employment possibilities with the career placement coordinator, she determined a graduate of the technical college with claimant's degree would be qualified to work in positions as a retail management associate, retail marketing associate, associate store manager, insurance adjuster, wholesale sales representative, administrative assistant, and human resource assistant (*id.*). Claimant was required to take classes such as principles of accounting, business marketing, college composition, and algebra, business law, introduction to computers, and economics. The technical college's career placement coordinator indicated that graduates with an associate degree in business

administration with a marketing management concentration often go into careers in customer service, sales, telephone sales, preliminary loan work, and patient registration. Recent employers of the school's graduates have included MBNA of Belfast and Farmington, Unitel, E Pro of Augusta, Skowhegan Savings Bank, and two local hospitals (*id.*).

Ms. Tolman next examined Claimant's work history. She noted that he was employed with the U.S. Army from 1973 to 1984, where he worked primarily as a transportation specialist. Based on his work history, Ms. Tolman did a transferable skills analysis. His work experiences as a structural welder should have given him the following skills in the field of metal fabrication and repair, craft technology, and mechanics: skillfully use hand tools and machines; read blueprints; measure, cut, and work on materials with great preciseness; use arithmetic and shop geometry to figure out amounts of materials needed, dimensions to be followed, and cost of materials; picture the finished product; and accept responsibility for the accuracy of the work (*id.*). Through working in sales, the claimant should understand company policies on payment plans and finance charges, arithmetic, contracts, and customer relations. The claimant's military experience as a transportation specialist translates into a civilian transportation specialist and work for airlines, shipping firms, and commercial freight lines.

Ms. Tolman identified five positions for the claimant, which she verified were open in August of 2001. Three positions were with the State of Maine: Account Clerk I, Account Clerk II, and Clerk II. The other two positions were a front desk clerk at the Comfort Inn and a Telesales Representative with MBNA. Ms. Tolman spoke to a representative in the Maine Human Resource department for more information about the positions. Account Clerk I and II were desk jobs and Clerk II required filing, running errands, and answering telephones. The representative indicated that they would be able to work with the claimant's 20 pound lifting capability. Ms. Tolman also contacted a human resource representative at the Comfort Inn. The position required working with spread sheets and sales records, but no kneeling, squatting, bending, or lifting. Finally, Ms. Tolman spoke to an administrative assistant in the human resource department at MBNA. The job was a part-time telesales position, with the opportunity for full-time if available, and it required good communication skills and basic computer knowledge.

Ms. Tolman calculated the claimant's wage earning capacity at approximately $250 to $509.60 per week. She expected him to earn a wage at the higher end of the scale due to his education and experience. She concluded that the labor market was favorable for an individual with the claimant's abilities (*id.*).

Since the 2001 hearing, there have been two medical evaluations of the claimant, one done at the behest of the employer and the other was done by an "independent medical examiner," which is a physician picked by the parties to evaluate an employee in a Maine workers' compensation claim. *See* 39-A M.R.S.A §312 (1992). Claimant also had additional treatment at the VA Hospital in Togus (CSX 3-4). Dr. Michael Mainen saw the claimant on February 20, 2003 at the request of the employer and reviewed the claimant's medical records (ESX 1). The examination began with a lengthy recount of the claimant's medical history. Claimant could not give Dr. Mainen a complete history and there were many inconsistencies between the record and his account. There were also many inconsistencies between his

recreational and occupational activity levels. Dr. Mainen noted that the medical records do not mention a right knee problem very often, but do mention back pain as far back as 1977. He had periodic myelograms and CT Scans. In 1983 and 1986, these came back normal, although in 1986, he was diagnosed with "lumbosacral strain." In 1994, they revealed that the claimant had a disc bulging. Claimant had periodic disability ratings. In 1993, he walked to his appointment with a cane and had a severe limp. Dr. Mainen noted that this was while claimant was gainfully employed in the construction industry. The report from the evaluation notes the claimant was "exaggerating or mimicking difficulties." There is a gap in the record from 1996 where there are virtually no notes dealing with the right knee and no mention of back pain. With regard to the July 2000 incident, Dr. Mainen notes that there are several accounts of what happened. At the Bath Urgent Care Center, Dr. Dumdey notes an acute injury with minor increase in symptoms gradually. However, three days later, at the OHA, there is no mention of the fall, but claimant complained of two and a half months of gradual increased pain.

Dr. Mainen mentioned that claimant has not returned to Dr. Watanabe since his August 2001 visit, where Dr. Watanabe described the claimant's back pain as "pretty much resolved" and could find no explanation for right knee symptoms. The claimant's new primary care doctor at Togus is Dr. Welch. Claimant was given a transcutaneous electrical nerve stimulation ("TENS") unit and a series of medications. Claimant says he wears the TENS unit for about 20 or 30 minutes at a time. He takes several medications, including methocarbomal; trazodone; hydrocodone with APAP; methadone 5 milligrams three times a day, once or twice a week; oxycodone 5 milligrams, which he takes for flare-ups every few days; and cyclobenzaprine. His only other doctors' visits have been to Urgent Care to receive Toradol injections for his back.

Dr. Mainen noted that the claimant came to the exam using a cane, which he generally carried in his right hand and leaned upon heavily. He walked with his left foot out to the side at a 30 degree angle and kept the knee straight. He did not have a hip lurch. Dr. Mainen was unable to characterize the claimant's gait pathologically, and he believed it to be histrionic. Claimant could not or would not elevate himself on his toes or heels. He attempted to do a deep knee squat, but was only able to do a partial squat bearing weight entirely on his right leg. Dr. Mainen noted that the claimant's thighs and calves appeared well muscled and symmetrical. During the physical exam, the claimant went to get lengths to show he was "experiencing" pain by extensively groaning and grimacing. However, he was not perspiring and his pulse did not elevate. His movement during the exam was inconsistent with his range of motion while seated and removing his clothes. The claimant was tender along the left iliac crest on his back and the upper lateral thigh. He had no paraspinal muscle spasms in spite of his very limited lumbar mobility. The exam of the lower extremities was positive for the subjective elements and negative for the objective. His reflexes were brisk and symmetrical at the knees and ankles.

Dr. Mainen diagnosed a remote history of left knee medial meniscectomy from 1982; a history of arthroscopy of the left knee in 1987 with debridement of Grade III medial femoral consylar chondromalacia; and a long-standing history of back pain of undetermined etiology with no objective pathology (*id.* at 13). He ruled out multi-articular inflammatory disorder, but could not rule out malingering. He could find no objective evidence that the claimant suffered a physical injury in July of 2000. His complaints have gotten worse with time rather than better. Assuming that there was a work-related injury, he was walking and exhibiting essentially normal

range of motion in both knees and the back within months of the incident, which is a sharp contrast to how he currently presents himself to doctors and at court. Dr. Mainen described him as being "dramatic" and presenting himself as a "severely incapacitated, cane-dependent, in chronic severe pain, and totally incapacitated" (*id.* at 14). However, he can find no objective reason for any of this.

While the claimant may have had some chondromalacia in the left knee unrelated to a work injury, there is no evidence of anything wrong with the right knee (*id.*). Dr. Mainen notes the lack of documentation regarding the claimant's back pain. He feels this incapacitating and immobilizing back pain developed spontaneously, as there is no mention of the pain in the examinations following the incident. Also noteworthy is the excellent condition of claimant's braces and cane, which show almost no wear despite the claimant's alleged daily dependence on them (*id.*). He did not have the quadriceps atrophy that would come with constantly wearing a knee brace and limiting mobility in the left knee. Almost all of Wadell's signs, a methodology for identifying nonorganic pain, were present. In conclusion, Dr. Mainen finds no evidence to support the patient's assertion that he suffered a serious incapacitating injury to the right or left knee or the back (*id.*). He does not consider the claimant to have any impairment in his right knee or back, but there may be a basis for impairment to the left knee from the problems in the 1980s (*id.* at 15). Dr. Mainen considers the claimant capable of working and would impose no restrictions.

On May 4, 2004, the claimant was examined by Dr. Matthew Donovan, an independent medical examiner under §312 of the Maine Workers' Compensation Act (ESX 3). Dr. Donovan obtained a brief history of the claimant's medical history and described the alleged work-related incident, as well as the subsequent treatment. Claimant told Dr. Donovan that the work-related injury occurred on July 2, which caused him to experience pain in his hips, low back, knees, and right wrist. On the day of the exam, claimant complained of constant pain in the low back, ranging from mild to severe, which can be triggered by anything from a loud noise to a sneeze (*id.* at 3). He also complained of pain in his left knee. He told Dr. Donovan he walks with a constant limp due to his low back and knee problems.

The claimant was awarded total temporary benefits in April of 2002 under the Maine Act. He says that the pain has worsened since the award. He describes the pain in his back worse than his knee. He described his physical activity to Dr. Donovan as very limited. On his account, he is limited in stair climbing, uses handicap ramps and is dependent on his crutches. He is able to walk short distances around the house without the crutches and can drive short distances, but requires another driver for longer trips, such as the 40-mile trip to the Togus VA Hospital. He has a seat in his shower and a reclining massage chair. On his hands and knees, he can arch and round his back, but does not do sit-ups, pull ups, or abdominal strengthening exercises. However, he does do Thera-Band and quad exercises. He has had his crutch for one and a half years and the brace for two years; he said he removes the brace only when he is in the recliner or in bed at night.

Upon examination, Dr. Donovan noted the claimant stood and sat multiple times, but was able to sit for prolonged periods of 20 minutes or more without evidence of significant discomfort (*id.* at 4). He was able to walk two steps on his heels before saying he is unable to

continue, and he refused to walk on his toes due to a shooting pain up his legs. He removed his left sock with his right toe, claiming he could not bend over. After enough prompting, he did lean forward to remove his sock with grimacing and facial reactions. When asked to put his finger to the floor, he bends only 10 degrees before complaining of diffuse pain. He reported tenderness from T6 to the lumbosacral junction, but there is no evidence of mass, tumor, or infection. Dr. Donovan did not note any asymmetry, spasms, or fasciculations. The circumferences of his right and left calves were equal, as were the circumferences of his thighs. He complains of severe pain during many of the range of motion tests. Dr. Donovan noted that the brace demonstrates minimal wear, which is inconsistent with daily use over a two-year period, nor was there any body odor (*id.* at 5). The crutch demonstrated minimal wear as well.

Dr. Donovan also reviewed surveillance videos taken of the claimant by a private investigator hired by the employer (*id.* at 5; ESX 6). The 2002 videos show a man, identified as the claimant, performing multiple tasks. He lifts large trash bags out of the back of a truck. He is able to step into the back of the truck with no symptoms of pain or limitations in motion. He extends his spin 20 degrees. He does not walk with the assistance of a cane or crutch. There is no limp detected. His gait is normal heel-toe walking. On another day, the claimant is driving the pickup truck. He bends and squats and performs a two-arm lug and drag with no evidence of pain. He bends forward 60 degrees to reach into the truck and unload it. He is able to climb in the truck with his left hip and knee flexed 90 degrees on one episode on 110 degrees a second time. The claimant is bending, twisting, and lifting with no evidence of painful behavior. Dr. Donovan notes this is sustained activity by the time on the tapes. He is able to thrust large bags, which Dr. Donovan estimates weighing between 10 and 40 pounds. While at a store, the claimant is able to push a shopping cart with 15 degrees of spinal forward flexion. Dr. Donovan notes a slight limp on two occasions, but his gait is normal heel-toe with no evidence of dropfoot or neurologic deficit.

According to Dr. Donovan, the 2003 videos show a man slinging a backpack onto his throacolumbar spine supplely with no evidence of pain and carrying it with a stiff kneed gait, but no evidence of pain. He climbed in and out of his low vehicle several times with lateral flexion of the spine supple. He carried groceries in his left arm on the affected side with no evidence of pain. Several months later the claimant is observed with a normal gait pushing a shopping cart. He did not appear to be wearing a brace as the creases are the same on both pant legs. He had a stable two-legged stance and a single leg stance with a torso twist. He attained 60 degrees of forward flexion of his spine placing objects into a cart with no rigidity in his spinal movement or painful manifestations. His left hip flexed 45 degrees comfortably on the cart, a position he could not obtain in the examining room. He placed a varus stress on his knee twisting the cart, which is pain-free for him. He was able to perform a single leg stance on the left.

Dr. Donovan concluded the right knee arthralgia was resolved. He thought the claimant's complaints regarding the left knee were consistent with arthritis. He also diagnosed low back strain with severe subjective complaints, but discordant clinical examination when compared to the videotapes. Dr. Donovan answered a series of questions for the state workers' compensation board. First, he believed "[the claimant's] incapacity for work had diminished" since the award

of benefits in 2002.[5] ESX 2, at 6. He based this view primarily on the review of the videos, because he found the clinical exam unreliable. He noted that multiple practitioners found the claimant to be inconsistent and even histrionic in his examinations. Second, he found the videos to be a fairly accurate review of the claimant's abilities, which are totally discordant with his reported disabilities. He noted that the videos are from several days covering almost a year and they are consistent with a person who has had a resolved low back strain. Finally, Dr. Donovan found the claimant to have suffered a work-related injury to his bilateral knees. His right knee injury has resolved as evidenced by the claimant's report. The left knee had a pre-existing condition of torn meniscus status post excision of this. His subsequent arthroscopic procedure was due to a significant aggravation of this pre-existing condition. Under the fourth edition of the American Medical Associations' *Guides to the Evaluation of Permanent Impairment*, Dr. Donovan considered the claimant to have a 3% whole person impairment. He believed the claimant had reached maximum medical improvement, as no further gains would be made from medical intervention.

The claimant also submitted some medical records from the VA hospital (CSX 3). On January 14, 2004, claimant again saw Dr. John Posey. Dr. Posey noted a history of lower back pain. He conducted a physical examination. There was full flexion in the back. The back was not tender and there was no pelvic tilt or paravertebral spasm. Claimant was positive for Waddell's signs. He had normal lower extremity pulses and no trophic skin changes. His knee and ankle reflexes were normal with bilateral flexor plantar responses. A CT Scan revealed moderately bulging disc material. Under "Clinical Impressions," Dr. Posey noted no evidence of an active radiculopathy, which results when nerve roots are compressed or irritated. He did find evidence of functional addition and an underlying sleep disorder. He recommended no surgical intervention and suggested the pain advisory clinic as a useful course of action. The claimant had another CT Scan on February 25, 2004. When compared to a previous CT Scan taken in November of 2002, vascular calcification compatible with atherosclerotic change was noted. Moderate disc bulging was again noted, slightly more pronounced at the L3-L4. Overall, the findings were much like those noted previously with an appearance of mildly accentuated posterior bulging of disc material toward the left of midline at L3-L4 and L4-L5. Claimant also submitted a list of drugs prescribed by doctors at the VA Medical Center in Togus (CSX 4). There are eight prescriptions listed as active on November 15, 2004: acetaminophen, carbamazepine, pramipexole, citalopram, risperidone, simvastatin, naproxen, and ipratropium.

At the August 2, 2004 hearing, the employer introduced video tape surveillance of the claimant, which it claims shows he does not have a disability and is capable of working. The employer hired Merrill's Investigations to conduct the surveillance on December 3, 4, 5, and 6, 2002; March 10 and 11, 2003; and November 10 and 14, 2003 (ESX 4, 6). The first investigator, Mark DeSeno, was not available to testify at the Department of Labor hearings, but his sworn testimony before the State Workers' Compensation Board was introduced as Employer's supplemental exhibit 5. Randy Washburn, who began surveillance on April 4, 2003, testified at the August 2, 2004 hearing (TR1 13). The video shows the claimant engaging in physical activities such as unloading a truck and shopping

[5] Put more conventionally, Dr. Donovan believes the claimant's capacity for work had increased.

The employer also submitted the decisions of the State of Maine Workers' Compensation Board ("State Board"). The State Board's first decision was made on April 12, 2002, a little over two months before the June 17, 2002 *Decision and Order* in this case (ESX 7). The second decision was made on November 1, 2004 (ESX 8).

The claimant's supplemental exhibits also include letters from the Department of Veterans Affairs (CSX 2). The first letter certifies "that the claimant is receiving compensation at the 100% rate for service-connected disabilities, which may entitle him to a property tax exemption and a free fishing and hunting license from the state of Maine." The second letter grants him commissary store and exchange privileges from the Armed Forces because he is "an honorably discharged veteran of the U.S. Army and has a service-connected disability evaluated at 100 percent."

Discussion

I. Collateral Estoppel

In *Bath Iron Works Corp. v. Director, OWCP [Acord]*, 125 F.3d 18 (1st Cir. 1997), the First Circuit held that a state workers' compensation commission's decision that the claimant's injury had no lasting effect on claimant's condition should be given collateral estoppel effect in regard to a later claim filed with the Department of Labor. *Id.* at 20. The Benefits Review Board has also said that collateral estoppel effect is to be given under the Longshore Act to appropriate findings of "other state or federal administrative tribunals." *Id.* at 21 (citing *Barlow v. Western Asbestos Co.*, 20 B.R.B.S (MB) 179, 180 (1988)). Collateral estoppel is applicable where:

> (1) the issue sought to be precluded is identical to one previously litigated; (2) the issue was actually determined in the prior proceeding; (3) the issue was a critical and necessary part of the judgment in the prior proceeding; (4) the prior judgment is final and valid; and (5) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum.

Hughes v. Clinchfield Coal Co., 21 B.L.R. 1-134 (1999).

The claimant filed a claim for benefits under the Maine workers' compensation statute, and a decision awarding the claimant compensation for partial disability was issued on April 12, 2002, two months before I issued my decision. Central to that award of benefits was the hearing officer's belief that the claimant was credible. Neither party argued for the application of collateral estoppel in regard to the State hearing officer's 2002 decision either before me or before the BRB. Subsequently, employer filed with the State a *Petition for Review*, which seems akin to a petition for modification under the Act, and *Petition to Determine Extent of Permanent Impairment*. Through that proceeding, benefits for partial disability were ended, and claimant was awarded benefits for a 3% impairment to the whole man. Central to this decision was the belief expressed by the same hearing officer that the claimant is not credible. The employer has

moved for collateral estoppel effect to be give to that determination in this proceeding. I find that collateral estoppel is inapplicable to either of the State hearing officer's decisions.

In regard to Maine hearing officer's 2004 decision, collateral estoppel is not applicable because the issues are different. That proceeding was concerned with claimant's permanent disability subsequent to March 3, 2003, whereas the case before me involves claimant's temporary disability immediately after the July 5, 2000 injury. Further, in her 2004 decision, the hearing officer stated that the "[e]mployee's primary complaint at this point is back pain . . . ." ESX 8, at 3. But in this case under the Act, I found that the claimant did not sustain a compensable injury to his back. Accordingly, the 2004 Maine decision was concerned with substantially different issues than this claim under the Act, and collateral estoppel is not appropriate.

In regard to the earlier claim, the same hearing officer awarded the employee benefits for partial incapacity (ESX 7). She found the claimant to be a credible witness with sufficient medical evidence to document a work-related injury (*id.* at 3). However, she also found that the claimant did not perform a thorough exploration of the labor market in his community for work within his restrictions. Based on the report of Kathleen Tolman, the hearing officer found that the claimant was not totally incapacitated, as he had some wage earning capacity (*id.* at 4).

Collateral estoppel is not applicable to this decision either. First and foremost, in order for collateral estoppel to apply, it must be pleaded and proved. Wright *et al*., 18 *Federal Practice & Procedure* §4405. As was stated above, neither party moved for collateral estoppel based on the 2002 State decision. It is not hard to fathom why. The hearing officer's decision, although more favorable to the claimant than to the employer, nevertheless was not completely favorable to the claimant, since the hearing officer found that the claimant was not totally disabled. Had claimant moved to apply collateral estoppel, he would have been stuck with both the favorable and unfavorable parts of the State award. Further, the decision was far too favorable to the claimant for the employer to seek estoppel. Since claimant was represented by counsel at the time the State hearing officer's decision was issued, and elected not to seek the application of collateral estoppel, there is no basis to apply it here.

Second, " 'federal courts must give the [state] agency's factfinding the same preclusive effect to which it would be entitled in the state's courts.' " *Acord*, 125 F.3d at 21, quoting *University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986). The Maine hearing officer did not give the 2002 decision preclusive effect. The hearing officer clearly changed her mind regarding the nature and extent of the claimant's disability, due in major part to her reappraisal of claimant's credibility. That she now finds that the claimant is not credible leads her to state "the prior decision's finding that Employee was able to work to his pain tolerance is no longer appropriate." ESX 8, at 4. She then finds that "[the claimant] has no work restrictions due to his July 5, 2000 work injury." *Id*. Therefore, the 2002 decision was not held to collaterally estop the hearing officer from revisiting issues which had been decided at that time. Since the State does not give preclusive effect to its 2002 decision, it will not be given preclusive effect in this claim under the Act.

Finally, it is questionable whether the State's 2002 decision is still valid. Although the hearing officer's 2004 decision did not explicitly vacate her 2002 decision, it is clear she no longer endorses the earlier decision. Collateral estoppel should not be applied to a decision that has been discredited.

Therefore, since collateral estoppel is not applicable, I will address the issues the BRB instructed me to consider on remand without reference to the State decisions.

II. Credibility

In my previous decision I found claimant was not a credible witness (*Decision and Order*, 2002, at 8). I placed great importance on the number of medical providers who questioned his reports of pain. The Board did not disturb my credibility determination (BRB D & O at 4). It affirmed my finding that the claimant did not establish that an accident occurred at work on July 5, 2000, because there is little mention of a fall in the medical reports and there are many inconsistencies in the claimant's statements regarding the accident. The number of physicians who made note of claimant's exaggeration of his symptoms has only increased since the previous hearing. Both Drs. Mainen and Donovan questioned the claimant's reports of pain and noted inconsistencies in his motions (*see* ESX 1 & 2). Also, surveillance videos are now part of the record, and these videos clearly prove that the claimant's subjective complaints are either fabricated or greatly exaggerated. Therefore, I reiterate my opinion that claimant is not a credible witness and his complaints of pain cannot be relied upon.

III. Back and Hip Injuries

The Board, reversing my finding that the claimant did not suffer work-related injuries to his knees, held that the claimant established work-related injuries to his knees as a matter of law.[6] The Board held that Drs. Boucher, Baker and Butler, as well as the nurse practitioner, Ms.

[6] I strongly disagree with the majority's holding that the evidence establishes an injury under the Act as a matter of law. For one thing, the majority's statement that I "erroneously combined the two elements of claimant's *prima facie* case – harm and working conditions," BRB D & O, at 4, is not true. I did not find that claimant's working conditions could not have caused his injuries. Nor did I state that the claimant had to affirmatively prove that working conditions caused his injuries in order to invoke the §20(a) presumption. Rather, I affirmatively found that claimant did not suffer any harm to his body during his employment with Atkinson. Since it is claimant's burden to establish that a harm occurred in order to invoke the §20(a) presumption, I found that the presumption had not been invoked. Second, even if the mere fact that sometime in his life claimant had suffered an injury to his body is sufficient to meet his burden of establishing a harm for the purpose of invoking the §20(a) presumption, that there is no objective evidence of a harm suffered during his employment and his subjective complaints are not credible should be sufficient to rebut the presumption. In that regard, the majority took one line of Dr. Boucher's report out of context in stating that his opinion does not support rebuttal of the presumption. *See* BRB D & O at 6. Dr. Boucher, whose examination of the claimant occurred only a month after his alleged injury, went on to state that:

Muller, diagnosed injuries to claimant's knees, and evidence from Drs. Boucher and Watanabe established that these injuries could have resulted from Claimant's employment with Atkinson. The Board further held that the employer did not establish rebuttal of the Section 20(a) presumption, opining that the opinions of Drs. Boucher and Antonucci are insufficient to establish lack of causality. The Board then directed me to determine whether the claimant suffered compensable injuries to his back and hips.

First, the claimant must establish that he has sustained injuries to his back and hips. If he can prove that he has injuries to these areas of his body and that conditions while employed at Atkinson could have caused those injuries, he will establish the §20(a) presumption. In regard to the claim for an injury to his back, claimant had radiographic evidence of impingement and a bulging disc at least as early as 1994 (CX 4, at 178). A CT scan performed on July 24, 2000 shows changes of osteoarthritis of the lumbar spine (*id*. at 180). The same reasoning which led the BRB to conclude that the claimant established an injury to his knees while working for Atkinson leads to the conclusion that claimant has an injury to his back in regard to the alleged cumulative trauma injury. Further, it is reasonable to presume that a job requiring at least moderate physical exertion could cause a bulging disc. Therefore, claimant has invoked the §20(a) presumption.

But even if the claimant has met his *prima facie* burden for establishing the applicability of the §20(a) presumption regarding a back injury, that presumption is rebutted by the opinions of Drs. Boucher and Mainen. Only a month after the alleged injury, and while the claimant was complaining of pain in his back, Dr. Boucher opined that "there is no causal relationship between the [claimant's] current complaints and the reported injury of July 5, 2000. . . . [The claimant had] no evidence of any acute problems with either knee, hips or low back. . . . More likely than not, the examinee never had a significant aggravation of any underlying condition, and his complaints are purely psychogenic." CX 3, at 22. Dr. Mainen, who examined the claimant on February 18, 2003, stated that he "could find no evidence to support the patient's assertion that

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> there is currently no evidence of any acute problems with either knee, hips, or low back. . . . More likely than not, the examinee never had a significant aggravation of any underlying condition, and his complaints are purely psychogenic. If there was any minor aggravation of underlying osteoarthritis, *this has long since resolved* . . . . The overall prognosis is good. Once the examinee's current Worker's Compensation claim is no longer an issue, I expect he will quickly return to normal function.

CX 3, at 22 (emphasis added). Dr. Boucher wrote his report without the benefit of all of the other medical reports which uniformly question the veracity of the claimant. Yet he clearly did not believe that the claimant suffered the work-related injury he alleged. Moreover, after reviewing all of the evidence in the record, medical and otherwise, I found that the alleged injury never occurred. By itself, my finding that the claimant did not incur a work-related injury while employed by Atkinson, either traumatically on July 5, 2000 or through the aggravation of a pre-existing condition, should have been sufficient to rebut the §20(a) presumption. The additional evidence filed on remand reinforces claimant's lack of credibility.

he suffered a serious incapacitating injury on or about July 5 [2000] either to the right knee, the left knee, or the back." ESX1, at 14. In fact, Dr. Mainen does not believe that the claimant suffered any physical injury at that time (*id*. at 13).

To rebut the §20(a) presumption requires "substantial evidence of non-causation. . . . This means 'reasonable probabilities'." *Bath Iron Works Corp. v. Director, OWCP [Harford],* 137 F.3d 673, 675 (1st Cir. 1998) (citations omitted). In *Harford*, the Benefits Review Board found a medical opinion insufficient to rebut the presumption because "it could not exclude possibilities – a typical expert opinion." *Id.* The court found this to be an impossible burden to place on an employer, and held that the doctor's opinion that "[Mr. Harford's] lung cancer was most likely the result of prior smoking history" was substantial evidence to rebut the §20(a) presumption (*id*.). The opinions of Drs. Boucher and Mainen cited above more than meet this standard. Therefore, I find that the presumption that the claimant suffered a work-related injury to his back has been rebutted.

Once the §20(a) presumption is rebutted, it falls out of the case, and it is up to the claimant to prove by a preponderance of the evidence that his back injury arose out of his employment with Atkinson. He cannot meet this burden. His utter lack of credibility precludes his establishing that he incurred a work-related injury in the months he worked for Atkinson in the absence of corroborating objective evidence, which is sorely lacking. Although he does have x-ray evidence of some abnormalities in his back, this x-ray evidence preceded his employment with Atkinson by many years. There is no x-ray evidence indicating that his back problems got worse in the short period he worked for Atkinson. Therefore, I find that the claimant did not suffer an injury to his back during his work for Atkinson.

Moreover, the evidence fails to prove that the claimant ever suffered an injury to his hips. Unlike his left knee and back, the record does not contain objective evidence of injury to claimant's hips at any time through July 5, 2000. X-rays of the pelvis and hips taken on July 24, 2000 at the Maine General Medical Center were interpreted as showing only "*very minimal* spurring at the acetabular margins." CX 2, at 10 (emphasis added). Since "minimal" means "smallest in amount or degree" (*American Heritage Dictionary* at 799 (2d College Ed. 1982)), it would appear that a finding of *very* minimal spurring has little significance. By itself, an x-ray showing very minimal spurring is not evidence of a harm to the body. Further, in his report Dr. Boucher stated that he reviewed the July 24, 2000 x-ray of claimant's hips and it showed no abnormalities (CX 3, at 18, 22). Since Dr. Boucher is board-certified in occupational medicine (*id*. at 24), his opinion is entitled to greater weight than the opinion of a radiologist, Dr. Gagliardi, whose other qualifications are unknown. Moreover, even if "very minimal spurring" can be considered a physical harm for the purposes of §20(a), there is no evidence that it could have been caused by claimant's employment with Atkinson.

Therefore, I find that the only injury claimant suffered during his employment with Atkinson was to his knees. He did not suffer an injury to his hips at any time, and any problems with his back occurred prior to his employment with Atkinson.

IV. Nature and Extent of Knee Injury

In order to receive benefits, Claimant first must establish a work-related injury. Since the Board held that claimant's knee injuries are work-related as a matter of law, the administrative law judge on remand was instructed to determine the compensation to which claimant was entitled due to his knee injuries and to consider claimant's back and hip injuries. Even if the claimant did suffer work-related injuries to his knees, as the Board has determined, I find that the claimant's allegations of disability are not credible and he is not entitled to any compensation for temporary disability under the Act.[7]

Claimant would be entitled to compensation for temporary *total* disability if his injuries to his knees prevented him from performing any work; he would be entitled to compensation for temporary *partial* disability if his wage-earning capacity was reduced as a result of the injuries. It initially is the claimant's burden to establish that he was disabled from doing his usual work. *Trans-State Dredging v. Benefit Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT) (4th Cir. 1984). If he meets that burden, then the employer must show that there are jobs available which the claimant is capable of performing and which he has a reasonable opportunity to obtain. I find that the claimant has failed to prove that the injuries to his knees resulted in an inability to do his usual work for the employer.

Any evidence in this record which would support claimant's contention that he could not continue to engage in his usual employment due to his knee injuries is based on his subjective complaints, which are not credible. Accordingly, I give the greatest weight to the opinion of Dr. Boucher, who believed claimant's subjective complaints were "extremely" exaggerated (CX 3, at 22). It was Dr. Boucher's opinion that "[i]f the [claimant] suffered any aggravation of underlying osteoarthritis as he reported on July 5, 2000, this clearly has *long since resolved*." *Id.* at 23 (emphasis added). He stated that there is no support for any work restrictions, and further treatment for injuries suffered on July 5, 2000 is not needed (*id*.). Since Dr. Boucher's examination was conducted on August 8, 2000, only a month after the alleged injury, that he believed any effects of that injury had *long since resolved* means he believed the claimant fully recovered almost immediately.

Dr. Boucher's opinion is supported by Dr. Dumdey, the first medical provider to see the claimant after the alleged injury. Other than claimant's complaints of pain, Dr. Dumdey's physical examination was essentially negative. Although Dr. Dumdey took claimant off work subject to reexamination at Occupational Health Associates (CX 1, at 5), there is little doubt that this was just a routine precaution. For it is apparent that he did not believe the claimant's complaints. This is best illustrated not by his statement that "on physical examination [the claimant] is groaning a lot" (*id*. at 3), or that the claimant "refuses to move his knees further than 45 [degrees]" (*id*.), or by his suspicion of malingering (*id*. at 4), but by his sarcastic observation that claimant, who reportedly injured himself when he bumped his right knee a few days earlier, "has a *tiny little scab* on his right knee." *Id*. at 3 (emphasis added). That Dr. Dumdey, only a few days after the alleged date of injury, conducted an essentially normal physical examination and

[7] Since this is only a claim for temporary disability, I will not address whether claimant is entitled to benefits under §8(c) of the Act for his knee injuries.

suspected the claimant of malingering supports Dr. Boucher's opinion that claimant was not disabled by any injuries he may have sustained on July 5, 2000.

The only other medical professionals who saw the claimant between the date of injury and Dr. Boucher's examination were Ms. Muller, the nurse practitioner who saw the claimant at Occupational Health Associates on July 13 and July 20, 2000 (CX 2), and Laura Corbett, a physician assistant at Togas VA Hospital, who also saw the claimant on July 20, 2000 (CX 4, at 95-97). After the first examination, Ms. Muller permitted the claimant to return to work, but put him on a light duty restriction. After the second examination, she took him off work completely. But these actions were based on the claimant's complaints of pain, not on objective evidence. In regard to Ms. Corbett, she did not recommend any work restrictions, probably because she believed that the claimant was not going to be working over the next couple of months. But she did recommend treatment for the claimant, also based only on his subjective complaints. The reliance by Ms. Muller and Ms. Corbett on subjective complaints renders their opinions regarding the claimant's disability valueless. Further, neither Ms. Muller nor Ms. Corbett are doctors. Since no foundation was laid in regard to their expertise in determining the nature and extent of a patient's disability, it cannot be determined whether they have any expertise in this regard. In any event, their opinions would be outweighed by the opinions of doctors, who do have expertise in making such determinations.

The record also contains the opinion of Dr. Mainen. Although Dr. Mainen did not examine the claimant until February, 2003, he reviewed all or virtually all of the medical records in evidence which were in existence at the time of his examination. Based upon all of this evidence, Dr. Mainen, in a very long and detailed report, concluded that he 'can find no evidence to support the patient's assertionthat he suffered a serious incapacitating injury on or about July 5, [2000]." ESX 1, at 14.

I give the greatest weight to the opinions of Drs. Boucher and Mainen. Therefore, I find that the claimant has failed to establish that he was in any way disabled from performing his usual work for Atkinson, and he is not entitled to benefits for temporary disability resulting from his work-related injury.

ORDER

IT IS ORDERED that the claim for compensation for temporary total disability is denied.

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JEFFREY TURECK
Administrative Law Judge